

The Trouble with Trial Lawyers, Part I

Shawn Steel, JD

When it comes to an acupuncturist's personal injury practice, the chief concern should be predatory tactics of the trial attorney. More often than not, the trial attorney causes more damage and turmoil to the doctor's practice than defense attorneys and insurance attorneys combined. The challenges from trial lawyers are three-fold:

1. interference and/or hostility for the doctors right to seek Medpay or PIP benefits;
2. failure to honor the doctor's lien or to protect the doctor's fee; and
3. failure for equitable distribution on fees upon settlement.

We will discuss examples of these problems, with effective solutions for each.

Jumping Your Medpay or PIP

A crucial element for the clinic when caring for a personal injury patient is to have some of their fees paid from the patient's own auto insurance carrier. The payment process is called Medpay in some states; in others, it is called PIP (personal injury protection).

This insurance is first-party insurance. A patient is entitled to have his/her medical bills reimbursed by their own insurance carrier to whatever limits the patient purchased. Historically, when a patient paid out-of-pocket for their medical expenses in an automobile accident, the patient would submit proof of payment to his/her own insurance company and get reimbursed. About 25 years ago, it became fashionable to employ assignment of benefits (AOB). The AOB would empower the doctor to receive the benefits directly from the patient's own insurance company. The patient would no longer have to pay out-of-pocket, and the doctor would get reimbursed directly from the patient's own insurance company to the policy limits.

For years, this system worked. However, with the increasing tension between third-party insurance carriers and trial lawyers, trial lawyers saw their profits emasculated. Third-party carriers were winning the war against MIST (minor impact soft tissue) cases overwhelmingly in most jurisdictions.

Insurance companies invented a new subsience called biomechanical accident analysis to pecably sway juries that minimal impacts could not cause injury. At the same time, doctors have still been getting paid through the patient's own personal car insurance. In the last 10 years, lawyers have also used the AOB and had their clients sign the document.

The patient car carrier faces a conflict. They receive AOBs: one from the doctor, one from the lawyer. Who is to pay? Because a lawyer's intimidation power is more effective, more often than not the insurance company opts to pay the lawyer for the doctor's own fee. Doctors are outraged and feel helpless. They invest considerable time, staff and resources in treating the patient, yet the attorney jumps his fee and keeps it in the lawyer's "trust" account.

What Is to Be Done?

We recommend an efficient three-step process that will minimize the doctor's time and maximize his/her chance of recovery.

1. When the doctor becomes aware that the attorney has "taken" the Medpay, the doctor needs to immediately send a cease and desist letter to the attorney demanding those funds be transferred within 72 hours to the doctor. The letter (please see attached sample copy) is an effective device in getting the lawyer's attention. Lawyers are not used to receiving demand letters from the treating doctor. The treating doctor is usually too nice, humble or afraid to do anything more than make forlorn phone calls. Stay off the telephone and use the letter. It is particularly important that not only should the doctor sign the letter; the patient needs to sign it as well. When the lawyer's client signs the demand letter, the attorney is virtually committing malpractice, if not an ethical problem, with the state bar by ignoring his/her client's written demand.

Sample 72-hour warning letter.

HOWARD FIGHTBACK, DC
8383 Wilshire Boulevard #640
Beverly Hills, CA 90021
CERTIFIED MAIL

John Dewey, Esq.
Dewey, Cheatum & Howe
1900 Century Blvd
Redwood, CA 95000

Re: Demand for Payment in 72 Hours
Our Patient/Your Client : William Victim
Date of Accident : January 1
Amount of Lien : \$1,500.00

Dear Mr. Dewey:

Enclosed please find a copy of the medical lien signed and dated by yourself. This lien guarantees that your office will pay our office once the case is settled. We understand that the case was settled recently, and that our patient has already received this compensation.

We assume that you will honor your lien contract, but your delay is causing us concern. Accordingly, we demand full and immediate payment of \$1,500.00 (see accompanying copies of bill and report). I am sure you are familiar with the provisions of the Rules of Professional Conduct of the State Bar of California. The Bar charges you as fiduciary for monies collected in this case.

If payment is not made, we will have no alternative but to file a lawsuit against you and your firm. We prefer not to take these measures, but unless receive the payment within 72 hours from the date of this letter, we will be forced to take these measures.

Sincerely,

Howard Fightback, DC

cc: William Dunn

Encls. Medical Lien

Medical Report

Medical Bill(s)

Letter from President of the State Bar of California, P. Terry Anderlini

2. The doctor needs to rescind the lawyer's AOB: a note in which doctors would know within 30 days care if their Medpay is being sidetracked to the trial lawyer. If so,

immediately have your patient sign the recision of AOB for the attorney. Fax and mail a copy of the recision agreement to the patient's insurance company to demand that they immediately cease and desist any of the doctor's fees being paid to the trial lawyer. Doctors don't realize that many trial attorneys have their own patients sign the trial lawyer's assignment of benefits. The recision should cut it off.

3. Finally, for the recalcitrant trial attorney who refuses to disgorge the doctor's money, we recommend that the doctor file a formal complaint with the state bar for wrongful handling of trust account funds. We also recommend the doctor demand that an investigation be undertaken, and second, an action of small claims against a trial attorney. Those tactics will be discussed in a later paper.

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